IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1778 OF 2005
WITH
CRIMINAL APPLICATION NO. 213 OF 2007

1. Sahakar Maharshi Shankarrao Mohite Patil Nagari Gramin Sahakari Pathsanstha and anr. ..Petitioners

Vs.

1. Subhash Bhimrao Gavsane and anr. ..Respondents

Mr. Rajiv Patil i/by Mr. V.V. Purwant for petitioners.
Mr. Nitin Jamdar for respondent no.1.
Mr. D.P. Adsule, APP for State.

CORAM: B.H. MARLAPALLE, J.

Date : November 02, 2007.

ORAL JUDGMENT:

1. This petition filed under Article 227 of the Constitution read with Section 482 of Code of Criminal Procedure prays for setting aside the order of issuance of process passed by the learned JMFC, Madha on 9/7/2004 in S.T.C. No. 417 of 2004 filed under Section 138 of the Negotiable Instruments Act, 1881 (the Act for short) and duly confirmed by the learned Ist Adhoc Additional Sessions Judge, Solapur by dismissing Criminal Revision Application No. 187 of

2004, as per his Judgment and Order dated 20/6/2005. In short, the petitioner - Credit Co-operative Society prays for quashing of the proceedings in S.T.C. No. 417 of 2004 filed under Section 138 of the Act in respect of the dishonour of cheque bearing No.249385 and in the sum of Rs.50,00,000/- drawn in favour of the complainant allegedly by the petitioner no.1 -Credit Society which is registered under the Maharashtra Co-operative Societies Act, 1960. The petition was admitted and by way of interim relief the trial of the complaint was stayed. As this was an ex parte order passed by this court on 22/12/2005, the complainant - present respondent no.1 filed Criminal Application NO. 213 of 2007 and prayed for vacating the interim relief. Criminal Application NO. 412 of 2006 was filed for the same relief by the complainant but it was turned down on 26/2/2007 by this court and the complainant was granted liberty to prefer a fresh application for vacating the stay, if the petition was not disposed off by 10/4/2007. Hence, this second application has been filed by the complainant. With the consent of the parties, the main petition itself has been heard finally and it is being decided on merits.

2. The petitioner no.1 is managed by a Managing Committee/Board of Directors and petitioner no.2 is the Secretary of the petitioner no.1-Society. The respondent no.1 is a certified Auditor by the Department for Cooperation, Government of Maharshtra for carrying out audit of Co-operative Societies. As per the letter dated 28/5/2003 issued by the District Deputy Registrar, Co-operative Societies at Solapur, the complainant came to be appointed as certified auditor for four different Co-operative Societies and first of them being the petitioner no.1-society. It is the case of the complainant that after the said order was issued by the District Deputy Registrar on 28/5/2003, the accused nos. 1 to 4 approached him sometimes in the month of April 2004 and requested to render consultancy services by way of legal/expert advice to streamline the working of the society and its branches and also to undertake the audit. The complainant agreed to render his service but claimed that his fees would be Rs.50,00,000/- which was allegedly agreed by the accused nos.1 to 4 and consequently the dishonoured cheque was issued on 3/5/2004 in the sum of Rs.50,00,000/-. The said

cheque was received dishonoured on 14/5/2004 from the Solapur District Central Co-op. Bank Limited, Kurduwadi Branch, Dist. Solapur and, therefore, on the same day the complainant issued a demand notice under Section 138 (b) of the Act. The notice was replied to by the accused on 17/6/2004 and it is obvious that it was not replied within 15 days from the receipt of the notice from the complainant. The claim of the complainant was denied in the reply and it was further claimed that the dishonoured cheque was, in fact, missing from the office of the accused no.1-society and a complaint to that effect was lodged with the Solapur District Central Co-operative Bank, Kurduwadi Branch on 25/3/2004. The notice further indicates that there was no such contract as claimed by the complainant and the society was not required to pay any fees to him. It was further alleged that, on the contrary, while discharging the duties as Auditor - the complainant had clandestinely taken away a blank cheque signed by the accused and sought to encash.

3. The learned Additional Sessions Judge considered all the grounds raised by the accused while challenging the order of issuance of process passed by

the learned JMFC and held that the defence so raised would be considered only during the trial and on adducing evidence by both the parties and it could not be said that the learned JMFC had committed any manifest error or exercised his jurisdiction erroneously while issuing the process.

4. The petitioners have reiterated the following grounds in challenging the concurrent view taken by both the courts below:-

(a) It was unbelievable by any stretch of imagination that the accused no.1-society could agree to pay a fees of Rs.50,00,000/- by way of consultancy charges to the complainant and the learned JMFC committed an error in issuing the process.

(b) The bank was informed by letter dated 23/3/2004 or 25/3/2004 that a blank cheque signed was missing and, therefore, it was informed not to pass/honour the said cheque. The revision court fell in error in not considering this specific averment.

(c) There was no existing legal liability in discharge of which the dishonour cheque was drawn by the accused in favour of the complainant.

(d) The legal fees of the audit that was allowed to the complainant was only Rs.23,499/- and there was no prima facie document to accept that the consultancy fees was agreed at Rs.50,00,000/- by the accused and to be paid to the complainant.

. Mr. Patil also submitted that the accused no.1 - society has its share capital of only Rs.6,00,000/- and could never think of agreeing to pay a fantastic sum of Rs.50,00,000/- as professional fees to a consultant like the complainant. He has pointed out the balance-sheet of accused no.1-society for the years ended on 31/3/2001, 31/3/2002 and 31/3/2003. The last balance-sheet indicates that the turn over of the society was to the tune of Rs.3,40,97,530/-.

5. Mr. Jamdar the learned counsel for the

respondent no.1-complainant has referred to the affidavit-in-reply filed opposing this petition and more particularly to the purported resolution passed on 2/4/2004 by the Managing Committee of the accused no.1-society thereby appointing the complainant as the legal consultant on a fees of Rs.50,00,000/-. A Photostat copy of the dishonoured cheque is on record and it is clear that the same was signed by the accused nos.2 to 4 i.e. Chairman, Secretary and Manager respectively. Accused Nos.2 and 4 are not before this court. Mr. Jamdar also referred to the balance-sheet of the accused no.1-society for the year ending 31/3/2005 and pointed out that the turn over had reached to Rs.18,61,19,150/-.

6. In a complaint filed under Section 138 of the Act, the following requirements are to be seen by the learned JMFC while issuing the order of process, namely,

(a) Drawing of a cheque in favour of the complainant and the cheque having been signed with a specific amount.

(b) Dishonour of cheque and intimation thereto by the concerned bank in writing.

(c) Issuance of demand notice by the Payee and its receipt by the drawer.

(d) Failure of the drawer to pay the cheque amount within a period of 15 days from the receipt of the notice and

(e) The existence of debt or other legally enforceable liability against which the cheque was drawn.

. If the complainant has made prima facie averments in his complaint regarding the above mentioned factors, the trial court has no choice but to issue the process order on recording the verification of the complainant. The Ad-hoc Additional Sessions Judge rightly considered the defence raised before him by the revision applicants i.e. the present petitioners and held that the same could be considered only during the trial and after the parties adduce evidence. These issues have also

been considered by the Apex Court in the case of M.M.T.C.Ltd. and anr. vs. MEDCHL Chemicals and Pharma (P) Ltd. and anr. **[(2002) 1 SCC 234]** and in the case of A.V. Murthy vs. B.S. Nagabasavanna **[(2002) 2 SCC 642]**. The ratio so laid down could be briefly summarised as under:-

(a) The power of quashing criminal proceedings should be exercised very stringently and with circumspection. It is well settled that the court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint and the inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice.

(b) Even though the cheque is dishonoured by reason of "stop payment" instructions, an offence under Section 138 could still be made out.

(c) Under Section 118 of the N.I. Act there is a presumption that until the contrary is

proved, every negotiable instrument was drawn for consideration and under Section 138 of the Act, it is specifically stated that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for discharge.

7. The existence of debt or any other liability, the cheque was misplaced and a complaint was recorded in the bank as well as local Police Station concerned, the cheque was stolen away by the complainant or any other person, the accused had never agreed to pay the fees of Rs.50,00,000/- to the complainant and the complainant's audit fee was only fixed at a certain amount and not at Rs.50,00,000/- are all the issues which are required to be examined by the trial court based on the evidence that the parties may adduce. The so called defence raised by the petitioners makes no case at all to invoke the inherent powers of this court under Section 482 of Cr.P.C. and quash the proceedings in STC No.417 of 2004, on the facts and in the circumstances of this case. The photostat copy of

the cheque brought on record prima facie indicates that all the three accused i.e. accused nos.2 to 4 had signed and whether the resolution relied upon by the complainant is fabricated or otherwise is a matter which requires to be gone through by assessing the evidence both oral as well as documentary that will come before the court during the trial of the complaint. Having regards to the above mentioned factors in a complaint filed under Section 138 of the Act, undoubtedly the complainant has made out a triable case and the revision court was right in dismissing the revision application, praying for quashing the process.

8. In the premises, this petition fails and the same is hereby dismissed. Rule is discharged. Ad-interim order stands vacated. Trial of the S.T.No.417 of 2004 is hereby expedited.

9. Criminal Application No.213/07 does not survive and shall stand disposed as such.

(B.H. Marlapalle,J.)